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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 664.

PIEDMONT & NORTHERN RAILWAY COMPANY, *Petitioner*,

v.

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, CAROLINA, CLINCHFIELD & OHIO RAILWAY, CAROLINA, CLINCHFIELD & OHIO RAILWAY OF SOUTH CAROLINA, AND CLINCHFIELD NORTHERN RAILWAY OF KENTUCKY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENTS, OTHER THAN THE INTERSTATE COMMERCE COMMISSION, IN OPPOSITION.

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OPINION BELOW.

The opinion below, of the United States District Court for the Western District of South Carolina (R. 435-457), is reported in 51 F. (2d) 766. The District Court, in compliance with Equity Rule 70½, found the facts specially (R. 402-433) and stated separately its conclusions of law

thereon (R. 433-435). It further referred in its opinion to, and filed in the cause with its opinion, a "Note", consisting of a brief filed by counsel for petitoner, defendant below, wherein was reviewed the legislative history of the Transportation Act, 1920, particularly of those sections containing references to interurban electric railways (R. 458-486).

JURISDICTION.

The petitioner invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347 (a).

QUESTION PRESENTED.

The petitioner's brief (p. 14) states in only its negative aspect the principal question presented, which necessarily has both positive and negative aspects. It may be more accurately stated thus:

Whether the District Court erred in holding that petitioner was forbidden from building its proposed extensions of railroad lines, without first securing certificate of public convenience and necessity from the Commission, by reason of the inhibition of Section 1, paragraph (18) of the Interstate Commerce Act as amended by Transportation Act, 1920, 49 U. S. C. 1 (18), and was not free to build said extensions without certificate, as being "an interurban electric railway which is not operated as a part or parts of a general steam railroad system of transportation," within the meaning of the exclusion language of Section 1, paragraph (22) of said Act as amended, 49 U. S. C. 1 (22).

In addition to its statement of the principal question raised, the petition says (p. 14):

> "Error is also assigned to the facts found by the District Court and to the exclusion of evidence relating to the interurban character of petitioner's railway, but these assignments of error raise no separate ques-

tions and are merely incidental to the principal question presented."

But it is to be observed that the assignments of error (Assignments VI, VII, VIII, IX, X, XI; R. 496-499) charge no error in any of the facts actually found by the District Court as to the history, construction, character of lines, equipment, traffic, revenues, methods of business, and national scope of the railroad business of petitoner and as to its importance as a competitor for interstate railroad business. Those findings are unchallenged. These assignments only charge error in failing to make additional and more specific findings as to electrical equipment and operation resulting in certain differences from steam railroad operations, and one assignment (XII, R. 500) charges that facts found as to threatened construction are irrelevant and immaterial.

STATUTES INVOLVED.

The applicable statutes are set forth in the Appendix, *infra*, pp. 29-31.

THE POSITION OF THESE RESPONDENTS AS TO THE PETITION.

These respondents, the principal steam railroads of the territory which would suffer traffic diversion and revenue depletion by the competition of the petitioner's extended lines if the enjoined extensions were built, while parties in interest expressly authorized by the statute, Section 1, paragraph (20), 49 U. S. C. 1 (20, to bring an injunction suit of this character, are, nevertheless, in this suit as interveners.

These respondents understand that this Court will take jurisdiction by certiorari of a cause pending on appeal in a circuit court of appeals, before the determination of the appeal by that court, only in an extraordinary case, a case

presenting not only a question of public importance, but also peculiar reasons for extraordinary celerity in reaching a final determination by this court without awaiting the statutory appellate procedure under which the circuit court of appeals has jurisdiction. *United States v. The Three Friends,* 166 U. S. 1; *American Construction Co. v. Jacksonville, etc., R. Co.,* 148 U. S. 372; *The Conqueror,* 166 U. S. 110; *Panama R. Co. v. Napier Shipping Co.,* 166 U. S. 280; *Hamilton Brown Shoe Co. v. Wolf,* 240 U. S. 251; *Spiller v. Atchison, etc., R. Co.,* 253 U. S. 117.

On the merits these respondents assert that the decree of the District Court below was manifestly right and they oppose the petition in so far as prayed on asserted incorrectness, or asserted doubt as to the correctness, of the decree below. They further assert that the record discloses no peculiar reason entitling petitioner to ask extraordinary celerity at this stage of a cause which has a background of five years of litigation. This case involves "an important question of federal law" only in the same sense in which any other case involving the question whether a particular electric railroad falls within the provisions of paragraph (18) or within the provisions of paragraph (22) would involve such important question.

These respondents think the decision below is so clearly right that no case is presented for the exercise by this Court of its discretion to review on certiorari. However, if it be deemed a proper case for ultimate review here, and in view of the position taken by the original plaintiff, the Interstate Commerce Commission, on brief, these respondents are just as willing that certiorari be granted now as after determination of the appeal by the Circuit Court of Appeals.

STATEMENT OF THE CASE.

As far as it goes, the petitioner's statement of the case is fair and accurate. It needs some amplification. The character of petitioner as a railroad, the character of its

railroad lines and business, are shown by findings of facts by the District Court, the correctness of which is not challenged in the assignments of error, and which may be abbreviated as follows:

Petitioner is a corporation of South Carolina, chartered as a regular railroad, having all the powers of any railroad under the laws of that state, with full power of eminent domain and power to operate by electricity or other motive power. (R. 403, finding 1.)

Only 2.9 miles of its present total mileage of 127.89 miles of railroad, or about 2.25 per cent, is located in city streets. The rest is built and operated on private right of way and goes around rather than through the cities. (R. 404, finding 2.)

Petitioner's present railroad lines were built by the Duke Power interests in the pursuance of an extensive scheme for building lines of freight carrying electric railroad to render an extensive interstate freight service, in addition to ordinary interurban service in local freight, passengers, baggage and express. The ultimate plan, to be accomplished by steps, was to achieve a continuous line of electric railroad from a connection with Seaboard Air Line in South Carolina, through important industrial cities in South and North Carolina, to Durham, N. C., to another connection with the Seaboard, and even further. (R. 404-405, finding 3.)

The immediate object was to build into and tap very heavy and attractive industrial traffic concentrations in the piedmont of each of those states and to divert a substantial part of this freight traffic from steam railroads, principally these respondents, to new interstate joint through routes to be formed by the lines of petitioner in connection with the interstate Seaboard system, which itself theretofore had no practicable access to the major part of these traffic concentrations. (R. 405, finding 4.)

Even before the lines were constructed an important traffic agreement was made with the Seaboard, containing

reciprocal, preferential agreements for routing traffic, to create and make effective the new joint through routes, and in which agreement the Seaboard granted highly favorable divisions to the petitioner's railroad. (R. 406-407, findings 7 and 8.)

The immediate effect of beginning operations on petitioner's lines under this agreement with the Seaboard was the diversion from these respondents' lines of a very substantial part of the interstate traffic of the industrial piedmont sections of the two states, the new through routes extending not only throughout the southeast but to all parts of the United States. (R. 419-420, finding IV, 10.)

The powerful and continuing effect of the agreement with the Seaboard is shown by the carload interchange of petitioner with Seaboard as compared with that with other steam roads. From 1927 to April, 1930, petitioner had annual carload interchange with Seaboard of from 54,477 carloads to 73,250 carloads, the interchange with the Seaboard being 75.5 to 78.5 per centum of petitioner's carload interchange with all steam railroads. (R. 418-419, finding IV, 9.)

Petitioner's present lines of railroad were originally built and are now standard gauge, standard railroad construction. They were built as higher class railroad lines than Southern Railway Company's lines in the same territory at the time. A heavy and expensive type of construction was adopted with a view to handling substantial interchange freight traffic in connection with steam railroads. The same ruling grades as those of the Southern and the Seaboard in the same territory were adopted. Eighty pound rail was used and has been maintained in excellent condition. To accomplish the ruling grades and to adapt the lines to heavy freight traffic, cuts and fills of steam railroad standard were used. The roadbed, ballast, crossties, turnouts and switches, culverts, drainage and trestles are all of standard single track steam railroad construction and excellently maintained. The trestles and bridges

were built according to standard railroad specifications. The sharpest curvatures on the lines are much less than corresponding curvatures on Southern and on Louisville & Nashville. Certain differences in construction exist which are incident to the use of electricity as motive power rather than steam. Coal chutes and water tanks are absent. The rails are bonded for electrical transmission. Overhead power is conveyed by catenary type trolleys supported by double standards, rather than by trolleys of the ordinary street car type. Petitioner has electric sub-stations for power along its lines and operates on 1500 volt direct current. (R. 411-412, finding II, 1.)

Petitioner proposed to use one hundred pound rail on its proposed extensions and to build its bridges thereon according to standard railroad double track standards, looking toward the extension of its interchange freight traffic. (R. 412, finding II, 2.)

With the exception of its electric locomotives and its passenger cars, the rolling stock equipment of petitioner is standard steam railroad equipment. It has 17 electric locomotives, ranging from 55 tons weight and 800 tonnage rating to 100 tons weight and 1,350 tonnage rating. It has 19 passenger cars, 17 of which are equipped with self-contained motor units, and 2 of which are trailers, without motors. It has 287 freight cars, which have no electrical equipment and are exactly the same in all respects as steam railroad freight cars. This, together with an official car, makes 288 cars interchangeable with steam railroads and which move constantly and freely over steam railroads all over the United States. Foreign line freight equipment of every character from the whole country moves constantly and freely over the lines of petitioner. As of December 31, 1929, the total investment in equipment since June 30, 1914, was $778,194.11, and of that total $674,803.04, approximately 85 per cent, represented expenditures for locomotives and interchangeable freight cars, equipment used exclusively in freight carriage. The

electric locomotives are not used for passenger service but only for freight. Petitioner's freight yards are of standard steam railroad construction and equipment. One of the principal yards is a joint facility with Seaboard and Georgia & Florida, steam railroads. A peculiarity of electric motive power is that the same locomotives are used for switching service and for line haul, the added power for heavy trains in line haul is secured by doubling the locomotives, which practically doubles the power, hence petitioner finds it unnecessary to have very large or heavy individual locomotives for line haul. Its locomotives are considerably lighter than the heaviest electric locomotives employed on electrified portions of such steam railroads as the Virginian and the Pennsylvania, but they are fully adequate to carry the traffic of petitioner. By doubling, its locomotives draw as many as 65 freight cars, and trains of 40 to 50 cars are quite usual. (R. 412-413, finding III, 1.)

Petitioner's local passenger business is handled in the method of what is ordinarily known as street, suburban and interurban passenger business, in street car-type cars, having self-contained motor units, sometimes with a trailer, but never more than two cars being operated together. It does not operate passenger trains of several cars. But as to part of its passenger business, petitioner has entered an interstate and national field. It has operated a through Pullman schedule in connection with the Seaboard. It is a member of the Southern Passenger Association, publishes and sells passenger fares to and from points all over the country in connection with steam carriers. It sell winter tourist tickets, convention tickets, tickets to Havana, Cuba, excursion tickets to Norfolk, Washington and northern points, in connection with steam roads, and it checks baggage on passenger tickets to points all over the country. It interchanges passengers on through interstate tickets but does not interchange passenger cars. In its freight business it interchanges loaded

freight cars in through interstate transportation. (R. 413-414, finding IV, 1.)

Its operating methods for the handling of its freight business are indistinguishable from single track steam railroads of the territory, except as to such differences as are merely incidental to electric motive power. It operates through freight trains and local freight trains in substantially the same manner as the steam railroads. Its trains are operated under train orders, clearance cards, meet orders, changes in orders, rules as to superior and inferior trains, air brakes, hand brakes, train protection, and many other details just as are trains of steam roads. Its signal system is not of such high class as the systems employed by longer lines of the steam railroads of the territory. It uses a selector semaphore system. Some of the steam railroads use systems based on the same principle. Petitioner serves industries directly from its lines and industrial tracks over industrial tracks belonging to industries, and over industrial tracks belonging to steam railroads, in substantially the same manner as is done by the steam railroads. The industries load solid cars to distant break-bulk points, which are picked up and given line haul by the petitioner, and by it delivered to connections and expedited to the break-bulk point, in substantially the same manner as by the steam railroads. The incoming freight from distant points comes in by steam railroad connections of the petitioner to its freight houses and is distributed by it substantially in the same manner as by steam railroads. It operates regularly scheduled daily freight package cars in connection with steam railroads from 18 distant points, including points as distant as Chicago, Boston, Providence, R. I., New Orleans, and St. Louis. This package car service is in connection not only with interstate steam railroads but also with ocean steamship lines. (R. 414-415, finding IV, 2.)

Petitioner's methods of business solicitation, its membership in traffic organizations, and its tariffs, published and concurred in, are national in scope. It maintains an

extensive traffic organization competing for traffic throughout the United States wherever it can secure a haul, either as originating, delivering or intermediate carrier. A number of its traffic representatives are joint employees representing petitioner and Durham & Southern, a steam railroad engaged in interstate commerce, owned by interests closely affiliated with those owning petitioner. It is a member of American Railway Association, Railway Accounting Officers' Association, Southern Association of Car Service Officers, Southern Claims Conference, Traffic Club of New York, Association of Railway Executives, Southern Freight Association, Southern Weighing and Inspection Bureau, Southeastern Demurrage and Storage Bureau, all steam railroad associations. It has membership on both the General Committee and Executive Committee of the Southern Freight Association, with voting power equal to any member interstate railroad. It has a regular contract with Railway Express Agency, Inc. It is a member of the Per Diem Agreement of steam railroads governing interchange of freight equipment. It repairs foreign line freight cars on its own lines and foreign line steam railroads repair its cars on their lines. It publishes and has filed 17 general individual tariffs under I. C. C. serial numbers of its own; it is a party as initial carrier to 184 general tariffs filed with the Commission; it is a participating carrier in 364 tariffs published under powers of attorney given by it to the publishing steam railroads. The scope of its tariffs embraces the entire country and parts of Mexico and Canada. It has the power, by changes in its own tariffs, to affect the tariffs and rates of steam railroads all over the United States. From 1916 to April 1, 1930, it has filed 303 proposals with the Southern Freight Association for rate changes to and from points all over the United States. (R. 415-416, finding IV, 3.)

From the beginning of the operation of petitioner's present lines, its freight revenues have been large and

have almost constantly increased, while passenger revenues, although in the first few years substantial, have progressively decreased. Its freight revenues have increased from $496,772.39, for the year ending June 30, 1914, to $2,340,809.58, for the year 1927, and $2,317,528.77, for the year 1929. Its total passenger revenues for the year ending June 30, 1914, were $324,045.21, and increased to a maximum of $871,775.17 for the year 1918. That was the only year in the history of its operations in which passenger revenues exceeded freight revenues, this condition being caused by the location of large army camps on and near its lines during the war. Since that year its passenger revenues have progressively decreased until they amounted to only $71,562.72 for the year 1929. For 1929, its freight revenues were 94.5 per cent, and its passenger revenues 2.9 per cent, of total revenues. (R. 416-417, finding IV, 4.)

A very small part of petitioner's freight business and of its total revenues comes from transportation of local freight, and the predominant part comes from interchange of freight with interstate steam railroads. For 1927, 5.9 per cent of total freight revenues were from local freight, and 94.1 per cent from interline interchange freight. These percentages were, for 1928, 4.5 per cent local freight, and 95.5 per cent interline interchange freight; for 1929, 4.3 per cent local freight, and 95.7 per cent interline interchange freight. (R. 417-418, finding IV, 5.)

The reverse is true as to passenger revenues, which in themselves have become of only minor importance. For 1927, 97.5 per cent of passenger revenues were local revenues, and 2.5 per cent interline revenues. For 1928 and 1929, the percentages were 97.8 per cent local and 2.2 per cent interline. (R. 418, finding IV, 6.)

Since 1916, petitioner has been in the millionaire class, a Class I railroad with operating revenues over a million dollars annually. Since 1923, its operating revenues have exceeded two million dollars annually. For 1927, they were $2,523,092.42, of which $2,340,809.58 came from

freight. For 1928, total revenues were $2,346,513.05, of which $2,185,110.36 came from freight. For 1929, its total revenues were $2,451,992.34, of which $2,317,528.77 came from freight. (R. 418, finding IV, 7.)

Dividing its freight revenues as between those from interstate and those from intrastate freight, the following are percentages: 1927, 89 per cent from interstate freight and 11 per cent from intrastate freight; 1928, 82.1 per cent interstate and 17.9 per cent intrastate freight; 1929, 80.7 per cent interstate and 19.3 per cent intrastate. The intrastate revenues referred to include freight interchanged with steam railroad connections but originating and destined to points within the same state. (R. 418, finding IV, 8.)

There is more than one loaded car of freight each day on petitioner's line for every passenger carried. Its average interchange of carload freight with steam railroads of the territory is approximately 6,000 cars per month. It forwards and receives carloads of freight to and from points all over the United States and points in Canada and Mexico. (R. 419, finding IV, 9.)

If petitioner's threatened extensions, or either of them, should be built, new and important joint through routes would be opened up to it. If both threatened extensions should be built, it would connect with Georgia & Florida, a steam railroad, at Greenwood, S. C., on the south, and with Norfolk & Western, a steam railroad, at Winston-Salem, N. C., on the north, and would thereby become the interior connecting link in a new through route and effective trunk line of connecting carriers leading from Florida throughout the southeast and to the northern gateways reached by the Norfolk & Western, and in the reverse direction, which would be strongly competitive with the existing trunk lines of the territory. If only the threatened extension from Spartanburg, S. C., to Gastonia, N. C., should be built, making interstate connection of the present lines, the same result would obtain, except that

the route from Charlotte to Winston-Salem and the connection there with Norfolk & Western would not be entirely over petitioner's own lines, but would be over a joint route formed by Norfolk Southern to Norwood, and Winston-Salem Southbound to Winston-Salem. (R. 420-421, finding V, 1.)

Petitioner's own estimate, made in its application to the Commission for a certificate for its extensions, was that the extensions would gain new business diverted from the steam railroads of 82,320 cars a year, including 12,300 cars of bridge traffic carried entirely over its lines as the interior connecting link in the aforesaid joint through routes, with a gain to itself of total new revenues of $3,890,016.57 for the first year, and it estimated that this revenue gain would be increased at the rate of 8.4 per cent for each year thereafter, reaching $5,822,344.01 the sixth year. By reason of the fact that they would lose a longer haul on such diverted traffic than the petitioner would gain, the witnesses of the intervening steam railroads estimated that the loss of revenues to their roads caused by the building of the threatened extensions would be at least twice the revenues to be gained by petitioner. Petitioner's threatened extensions, if built, would divert from the intervening steam railroads millions of dollars of freight revenue annually, to their irreparable injury. (R. 421,422, finding V, 2.)

The enjoined extensions, if built, would directly compete with and injure a new cut-off line of the Louisville & Nashville from the Harlan County coal fields, which was built under authority of a certificate of the Commission, at a total cost of over five million dollars. Louisville & Nashville built this new line before it learned of petitioner's threatened extensions. The building of petitioner's extensions would create a new through route from the coal fields on the Norfolk & Western, directly competing with and diverting traffic from the new through route

of the Louisville & Nashville authorized by the Commission. (R. 422, finding V, 3.)

The Duke Power Company interests and allied trusts and interests controlling and owning petitioner are large shippers and receivers of freight and have a large power for controlling freight traffic of others in the territory. This power to control freight traffic is used to favor petitioner's lines of railroad and to favor the railroad of the Durham & Southern, owned by allied interests. The intervening steam railroads have felt sharply the effect of this control of traffic in favor of petitioner. (R. 422-423, finding V, 4.)

The overwhelmingly predominant part of petitioner's business is interchange interstate freight traffic of national character and scope, essentially the same, and in all essential respects conducted the same, as the business of the steam freight carriers of the territory. Such differences in construction, equipment, operations and method of handling as exist are purely incidental to the use of electric motive power instead of steam. Petitioner's purely local traffic in freight, passengers, baggage, and express is so small as to be relatively inconsequential. The probable effect of the proposed extensions, if built, either one or both, would be a substantial gain in interchange interstate freight traffic of national importance. The purely local traffic to be gained would be inconsequential. (R. 423-424, finding V, 5.)

ARGUMENT.

I.

The question here raised is admitted to be an important question of federal law which has not been expressly settled by this court, but it is controlled by previous decisions of this court interpreting the Transportation Act, 1920.

We admit that the question as to the scope of the application of the inhibitions of Section 1, paragraphs (18)

to (21), of the Interstate Commerce Act, as amended by Transportation Act, 1920, 49 U. S. C. 1 (18) to (21), to independently owned and operated interstate freight carrying electric railroads, and as to the scope of the language of paragraph (22) of that section in excluding from federal regulation extensions and abandonments of "interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation," is an important question of federal law.

We admit that this Court has not in terms defined the scope of the quoted part of the language of paragraph (22). The question of its scope is not of a character to be defined once for all in an opinion. It is the character of question which this Court has always dealt with by the "gradual process of judicial inclusion and exclusion."

Whether a particular carrier falls within the inhibitions of paragraphs (18) to (21) or within the exceptions of paragraph (22) necessarily depends upon the facts as to the character of that particular carrier and its proposed extensions, its construction, equipment, history, traffic and business, revenues, competition and effect on the national transportation system sought to be fostered and preserved by the Transportation Act.

This Court, in *Texas & Pacific R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, has laid down the rule for the construction of the Transportation Act, in the light of the context of its language, and in the light of the purposes sought to be accomplished by that legislation and of the evils sought to be remedied. That rule for construction was there applied to the first part of the same sentence of paragraph (22), the last part of which is here in question.

The District Court below followed that decision. It said, referring to this Court's opinion in the *Texas & Pacific Case* (R. 451-453):

> "The Court in that case laid down the true guide for the construction of paragraph (22). It held that

the guide was to be found in the context in which the language was used and in the relation of the specific provisions to the railroad policy and legislative purpose introduced by the Transportation Act. If the Court in that case had 'stuck in the bark' of the particular word used, had given to that word in this exclusion provision a purely literal meaning, the track sought to be built by the Gulf, Colorado & Santa Fe would have been an 'industrial track' just as much as the defendant in this case would be an 'interurban electric railway' within a strictly literal interpretation of that expression.

"The Supreme Court, in the Texas & Pacific case, did not allow their interpretation of the meaning of 'industrial track' to be controlled by arguments based on the rulings of the Commission as to what were industrial tracks, or by the sense in which railroad companies had loosely employed this expression. If they had been guided by such considerations, they would assuredly have held that the proposed track of only seven and one half miles was an industrial track. But the Supreme Court expressly repudiated these considerations, and took as its guide the real purpose which the extension would serve. They held that it was not an industrial track, but a real extension for which a certificate had first to be procured from the Interstate Commerce Commission before construction would be allowed, because of the effect which this extension would have on the rival railroad companies."

After quoting from the opinion in the *Texas & Pacific Case*, the District Court further said (R. 453):

"Such is the construction placed upon one half of paragraph 22. It is only logical to apply the same construction to the remaining portions of the same paragraph, *noscitur a sociis*. Congress bracketed these phrases together and it would be highly illogical to apply one rule of construction to one phrase and a different rule to the other."

The District Court also followed this Court's decisions in *Wisconsin Railroad Commission v. Chi., B. & Q. R. Co.*, 257 U. S. 563, *New England Divisions Case*, 261 U. S. 184, *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, in all of which this Court construed and interpreted the Transportation Act in the light of the evils sought to be remedied and the new legislative policy and purposes sought to be accomplished by that Act.

We think these decisions and that in the *Texas & Pacific Case* are controlling here and that this Court has already so fully laid down the controlling principles for interpreting and construing the Transportation Act as to make it unnecessary for it to take extraordinary direct jurisdiction of a particular case, such as this, involving application of the controlling principles to particular facts as to a particular carrier. Any case wherein is raised the question whether paragraph (18) or paragraph (22) applies to a particular electric railroad would be a case raising "an important question of Federal law" in exactly the same sense as is this.

Upon the facts found by the District Court, it is clear that the petitioner is a carrier of such national importance, and that its proposed extensions would have such an effect on the national system of transportation, as to be within the legislative purposes sought to be accomplished by paragraphs (18) to (21) and that those paragraphs must apply, unless, by the language used in the exclusion provision of paragraph (22) (an exception in a remedial statute, which exception must be strictly construed), Congress intended to exclude entirely from Federal regulation of extensions and abandonments all railroads motivated by electricity and owned and operated independently of any steam railroad. That would mean that the mere question of motive power, not the question of the effect on the national transportation system, was made the test of Federal jurisdiction over extensions and abandonments. It would

impute to Congress an intention to discriminate against steam, and in favor of electric railroads.

It is not conceivable that any extension of any independent interstate electric freight carrying railroad could come within the inhibitions of paragraph (18) if the proposed extensions of the petitioner do not.

Petitioner makes in its brief (pp. 17-19) an appealing suggestion of the difficulties under which officials of an electric carrier, such as it is, may labor, in view of the criminal provisions of the statute, in determining whether such carrier is within paragraph (22). The sufficient answer to this would seem to be that no criminal proceedings have been brought against petitioner's officials, or are here involved. If they were brought, then would be time enough to determine whether the sections of the statute contain sufficient definition to meet the requirements of the criminal law.

In the meantime, petitioner and its officers cannot well be misled as to its probable status. The Commission has decided that it is within paragraph (18), 138 I. C. C. 363. A court of three judges, although in a case of which it did not have jurisdiction, has decided the same way in a carefully considered opinion, 30 F. (2d) 421. The court below has made the same decision and has enjoined threatened violations of paragraph (18). It is hardly thinkable, under the circumstances, that petitioner's officers should fall into a course of conduct which would subject them to criminal prosecution under either paragraph (18) or Section 20a, covering issuance of securities.

II.

The District Court gave consideration to the context of those provisions of the Interstate Commerce Act, as amended by Transportation Act, 1920, in which the term "interurban electric railways" appears.

The petitioner's brief asserts that no consideration was given by the District Court to the context of other pro-

visions of the Act using the term "interurban electric railways" in different connections and sometimes with different modification, Section 15a, Section 204 (49 U. S. C. 73), Section 209 (49 U. S. C. 77). This assertion is evidently made because the opinion below does not discuss these other provisions.

But the opinion below made the same decision, upon the same grounds, as the decision by the three judge court in its opinion in the former suit under the Urgent Deficiencies Act, and expressly referred to and followed that opinion. It said (R. 450):

> "But all of these cases are referred to and discussed in the previous opinion by the three-judge court, which is reported in 30 F. (2d), at pages 429, 430 and 431. This opinion, going over the same ground, and deciding the same question in the same way, admittedly tracks the former decision of the three judges, both in view of the law and in statement of the evidence."

And the opinion of the three judges, Soper, District Judge, writing, in the same District Court, gave detailed consideration to the argument of petitioner, there also made, based on the comparison of the varying uses of the term in the various sections of the Act. In that opinion, 30 F. (2d) 421, 432, 433, the court set out all the other provisions referring to electric railroads in a foot note. And, after comparison of the different provisions, that court said:

> "It is apparent from these enactments that the carrier described by Congress as an interurban electric railway is one which may have one or more of the following characteristics: (1) It may be operated as part of a general steam railroad system of transportation; (2) It may have as its principal source of operating revenue, passenger traffic or sale of power, heat and light; (3) It may have as its principal source

of operating revenue, freight traffic; (4) It may be engaged in the general transportation of freight; (5) It may make through traffic arrangements with steam railroads and thereby increase its freight business.

"Moreover, it is clear that engagement by an interurban electric railway in the general transportation of freight does not of itself bring the carrier within the jurisdiction of the Commission over the construction and extension of railroad lines. No other conclusion can fairly be drawn from the fact that an interurban electric railway, engaged in the general transportation of freight, is kept within the rate making power given to the Commission by Section 15a, but such a carrier is not mentioned at all in the exception set out in Paragraph 22 of Section 1. Hence the petitioner, bearing in mind that the Piedmont & Northern performs the service of an interurban electric railway and engages in the general transportation of freight, contends that the railroad is within the exception of Paragraph 22 and is at liberty to extend its lines without the Commission's consent. But these considerations do not necessarily lead to the conclusion sought to be reached. It is true that an interurban carrier may be entitled to that descriptive name although it participates in general freight traffic; but it does not follow that every electric carrier, so engaged, is an interurban railroad. Freight traffic may be limited in extent and within the scope of a carrier devoted primarily to local business, and at the same time, be general in its nature. The carrier may transport the kinds of property usually carried by steam roads in addition to the carriage of baggage, mail and express, and yet be so restricted in its operations that it may not be properly classified with general steam carriers whose operations cover a wide field. See the discussion in Lackawanna & Wyoming Valley Ry., 105 I. C. C. 178.

"The difference in language between the exception in Section 15a and the exception in Section 1, Paragraph 22, may not be ignored, but it is accounted for by the fact that in one case Congress was dealing with

rates, and in the other, with the construction of new lines. It evidently concluded that if an electric interurban road should build up a business of transporting property to such an extent as to be engaged in the general transportation of freight, it should be included in the general rate adjustment provided in Section 15a with a view to uniformity of rates and the connection of the carrier with steam railroads. On the other hand, Congress was of the opinion that so long as an electric carrier should remain independent of steam railroads in its operation and control, and should be engaged in the local carriage of passengers and freight, as its primary business, the extension of its line would remain a matter of local concern and should be left to the regulation of local authority. It is obviously difficult to form an exact definition of the term under discussion and to say when the general freight business of an electric railway has become so great that it has crossed the line between an interurban railroad, engaged in the general transportation of freight, and a general carrier subject to the provisions of the statute. But there is no difficulty in the case at bar in determining that the Piedmont & Northern has ceased to be primarily an interurban railroad. If any line of demarcation is to be drawn there can be no doubt that a railroad, 92 per cent of whose traffic comes from the general transportation of freight, and 95 per cent of whose freight traffic is interchanged with carriers connecting it with all parts of the United States, is to be placed in the same category as a general steam railroad."

It would have been repetition for the District Court in the opinion below to have said the same thing. It did so by reference. We submit that the above quotation is entirely sound. Giving the fullest significance to the differences in the use of the term "interurban electric railways" in the different sections of the statute, such consideration still falls far short of the conclusion that such a carrier as petitioner, having such business as is shown on the record here, is free to build extensions of the national sig-

nificance of those here enjoined, without certificate authority from the Commission.

That the District Court gave full and careful consideration to the argument of petitioner based on comparison of the different references to "interurban electric railways" in the various sections of the Act would seem to be conclusively demonstrated also by the fact that the court filed with the opinion, as an explanatory "note" the elaborate brief filed by counsel for the petitioner, covering the legislative history of the various sections. (R. 458-486.)

Referring to this "note," the court said in its opinion (R. 455):

> "In a note filed along with this opinion, we make definite reference to the proceedings referred to in this part of our opinion. See attached note under separate cover."

III.

No conflict is apparent between the decision of the District Court below and the decisions of this Court in Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, and United States v. Village of Hubbard, 266 U. S. 474.

In neither the *Omaha Street Railway Case* nor the *Village of Hubbard Case* did this Court undertake to draw the line of distinction between interurban electric railways and electric railroads which are more than interurbans and are in the same category as to business and effect on national commerce as interstate steam railroads.

The *Omaha Street Railway Case* was decided years before the enactment of Transportation Act, 1920, to-wit on June 9, 1913. It drew the line of distinction between street railways, which were not subject to any regulation by the Interstate Commerce Commission, and electric railroads, which were subject to its regulation as being "railroads" engaged in interstate commerce. The specific holding was

that a street railway, built in streets and not on private right of way, having no power of eminent domain, and engaging in, and authorized to engage in, no freight carriage, but doing only a passenger business, was not a "railroad" as that term was used in the Act to Regulate Commerce and hence was not subject to Federal regulation even though it carried passengers on street cars across a state line.

In holding that, this Court merely distinguished such a street railway from interurban railways with electric motive power which are "railroads" and, as such, subject to the Act to Regulate Commerce if engaged in interstate commerce. No attempt was made to draw the line within the general class of electric "railroads" subject to Federal regulation, distinguishing between those properly classed as "interurbans" and those outside such class.

The *Village of Hubbard Case* was decided after the passage of the Transportation Act, to-wit on January 5, 1925. But there again this Court did not attempt to draw the line of demarcation between electric railroads properly classed as "interurban electric railways" and electric railroads which cannot properly be so classed under the provisions of the Transportation Act.

The precise holding there was that the Interstate Commerce Commission had jurisdiction, under the Act of 1887 to Regulate Commerce, to prevent discrimination against interstate commerce by an interurban electric railroad even though not engaged in the general transportation of freight. There again the court simply gave its attention to the line of distinction between street railways, not subject to Federal regulation at all, and interurban electric railways which are subject to Federal regulation.

The court did there comment, in support of its holding that the Commission had power to regulate interurbans, on the different provisions of the Transportation Act referring to interurbans, *as negativing an intention to exclude such carriers from Federal regulation.* There was

no attempt to draw the line here involved, within the general class of electric railroads subject to Federal regulation, between those railroads properly classed as "interurban electric railways" within the various inclusion and exclusion provisions, on the one hand, and, on the other, electric railroads properly in the same category for regulation as steam railroads and hence not within the class of "interurban electric railways," excluded by some provisions of the Transportation Act from, and included by other provisions in, specific regulatory powers of the Commission.

Nothing that was said in either of those cases intimated that an electrically operated freight carrying railroad of the scope, competitive power, and national importance of the Piedmont & Northern, as shown by the findings on this record, is free from Federal regulation of extensions as being an "interurban electric railway" within the meaning of paragraph (22) of Section 1 of the Act.

The opinion of the court of three judges in the former suit discussed those two decisions fully and distinguished the present question. 30 F. (2d) 421, 432-434. We see no probable or possible conflict between those decisions of this Court and the decision below here.

IV.

The opinion of this Court in the case of Texas & P. R. Co. v. Gulf, C. & S. F. R. Co. 270 U. S. 266, is controlling of the question here. The District Court could not have decided the question otherwise than it did under that case and its doctrine was not extended beyond its necessary results.

The decision of this Court in the *Texas & Pacific Case* did not turn on the expression "located wholly within one state" as used in paragraph (22). The trackage involved in that case would have been located wholly within one state. If the decision had turned on that language, it would have been the other way, that no certificate of the Interstate Commerce Commission was required.

So that decision cannot be distinguished, as petitioner attempts to distinguish it, on the theory that the words "located wholly within one state" in paragraph (22) modify only "spur, industrial, team, switching or side tracks," and not "or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation," and that to that extent those words constitute a difference in treatment between spur, industrial, etc., tracks and interurban electric railways, etc. This Court's decision did not turn on such distinction, if its exists, since the trackage there involved was wholly within one state. The District Court's decision below did not turn on either the recognition or rejection of such distinction. And the extensions of the petitioner here enjoined would not be located within one state. They would be interstate extensions.

The question in the *Texas & Pacific Case* was whether the trackage there involved, admittedly to be wholly within one state, was properly to be considered as a "spur" or "industrial" track within the meaning of paragraph (22), which the carrier could construct without certificate, or whether it was an extension of line requiring certificate authority under paragraph (18).

That question is entirely analogous to the question here. The exclusion of spur, industrial, etc., tracks is a part of the same sentence as the exclusion of "street, suburban, or interurban electric railways," etc. Manifestly the same *rationale* for exclusion applied to both. This Court there applied two tests for construing the exclusion language of paragraph (22): (1) Construction in the light of the context; (2) Construction in the light of the evils sought to be remedied and the legislative purposes sought to be accomplished by the Transportation Act.

A third applicable rule of construction was enounced by this Court in *Spokane-Inland Empire R. Co. v. United States*, 241 U. S. 344: that the remedial part of a remedial

statute should be liberally construed and, by the same token, that exceptions in a remedial statute should be strictly construed, because such construction is equally necessary to give effect to the remedial purposes of the legislation.

The court below followed these three rules of construction and it could have reached the opposite result only by repudiating them all.

The trackage involved in the *Texas & Pacific Case* was only seven and a half miles, to be located in one state, and the anticipated revenues to be gained by the Santa Fe and diverted from the Texas & Pacific amounted to around $500,000.00 a year, 270 U. S. 266, 276. And the trackage would have served only a particular group of industries. It came literally within definitions of "industrial tracks" by the commissions, and by the courts, made in other connections, and within that term as loosely used by railroads. But this Court held the trackage would not be a spur or industrial track within the meaning of paragraph (22), construed in the light of the context and of the remedial purposes of the Act.

Here we are concerned with proposed extensions of a total of 128 miles, one across a state line, which would create a continuous interstate line of railroad of 255.89 miles (R. 424, finding VI, 1), predominantly engaged in interstate freight traffic of national importance, and the effect of which extensions would be a diversion of millions of dollars of interstate freight traffic revenues from the principal trunk lines of the territory, except the one having a preferential agreement with the petitioner, and the creation of a new effective trunk line of connecting carriers north and south throughout the southeast.

These extensions, if permitted, would transform the transportation system in the southeast and would have an extensive effect on the national transportation system.

Not only did the District Court not extend the decision by this Court in the *Texas & Pacific Case*, but that deci-

sion applies and controls here *a fortiori* as to all the reasoning upon which it was grounded.

Petitioner argues on brief (pp. 27-28) that the decision below does not contain sufficient definition to enable a company, proposing after the Transportation Act to build an entire new line of electric railroad, to determine whether it would have to secure a certificate from the Commission or whether its projected railroad would be an "interurban electric railway" within the exemption of paragraph (22). That might be a difficult question to determine. It might conceivably need to await determination until the new road's business, character and effect could be determined. Or the company might have to act at its peril.

But, like the suggested possibility of criminal prosecutions, it is not the question raised here. The petitioner's lines have been in operation for years. Its character, its business, its relation to national transportation and to the legislative purposes of the Transportation Act are known. The effect of its proposed extensions is demonstrable and demonstrated without contradiction.

Either the petitioner must secure a certificate before it, having the character and business shown, can build extensions of the character and effect shown by the record, or Congress so used language in paragraph (22) as that any electric railroad not owned or operated by a steam railroad, no matter how national its scope and effect, is free to extend as far as it likes without certificate under Federal authority.

V.

The decision below is also in accord with decisions of the Commission and of other courts.

The decision below is in accord with the decisions by the Commission in: *Proposed Control of Sacramento-Northern Railway by W. P. R. Co.*, 71 I. C. C. 653, and *Piedmont & Northern's Application for Certificate*, 138 I. C. C. 368.

It is in accord with court decisions in the following cases: *Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co.*, 286 Fed. 540; *Pennsylvania Railroad Co. v. United States*, 40 F. (2d) 921; and *Piedmont & Northern Railway Co. v. United States of America*, 30 F. (2d) 421.

CONCLUSION.

The decision below is correct. There is no conflict of decisions. It would seem that the petition should be denied. If this Court takes jurisdiction at this stage, the decision below should be affirmed on the merits.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

Section 1, paragraphs (18) to (22) of the Interstate Commerce Act as amended by Transportation Act, 1920, 49 U. S. C. 1 (18) to (22):

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in

each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative, without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and neces-

sity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.